CURRENT LEGISLATION

EQUALIZING THE LEGAL STATUS OF THE SEXES.[1]—Despite many ameliorative statutes on the subject, women, even up to the last year, have been under severe legal disabilities, many if not all of which are of common law origin.[2] The ratification of the 19th Amendment, however, has been the starting point for the enacting of diversified remedial legislation in more than half the states of the Union. It should be noted, however, that the suffrage problem differs essentially from the problems dealt with by this legislation. The former involves merely the fitness of women to participate in the choice of those who govern. The latter bring into consideration woman's fitness to hold such public offices, and raise the question as to whether woman's economic and social position warrant the equalization of the legal status of the sexes in other respects, as for example, the guardianship of children, and rights of dower and curtesy.

As to the capacity of women to hold public offices, and as to the effect thereof upon the efficient administration of the government: "sex is the cause of only a small fraction of the differences between individuals. The differences of men from men and of women from women are nearly as great as the differences between men and women."[3] The fact that men have excelled women in the great scientific, artistic, and general achievements of the world is probably due to the "greater variability [divergence from the average] within the male sex,"[4] and to the great "strength of the fighting instinct in the male."[5] Thus, except for heights reserved for geniuses, women, if similarly trained, could generally compete on an equal footing with men. In any event, the efficiency of administration would not be lessened by allowing such competition. Since women would not be subsidized or protected therein, they would only prevail if they actually be more competent.

It may be said, however, that the ineligibility to office should be imposed so that women may surely attend to that for which they alone are naturally fitted; namely, domestic affairs. But if it is natural for women to be in the home, and if the home is not such a drudgery as to inhibit the functioning of this natural impulse, no restraint would be required to keep the women there.[6] Further, by the removal of the restraint, provision would be made not only for those exceptional women for whom the home holds no all-absorbing interest; but also for those whose homes have disintegrated due to the departure of children therefrom for one reason or another, and for those unmarried women upon whom the management of a home did not devolve.

Hence the action of six states in holding that sex shall not disqualify one

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[1] No pretence is made in this note to cover all the 1921 legislation. However, the statutes of those states, thirty-four in number, which were in book form at the time of writing were examined.

[2] In the case of married women the legal disability was almost complete. Blackstone says that the "legal existence of the woman is suspended . . . or at least incorporated and consolidated into that of her husband . . . " 1 Bl. Comm. 442; *cf. Bottoms* v. *Corley* (1871) 52 Tenn. 1, 8.

[3] 3 Thorndike, *Educational Psychology* (1913) 205.

[4] *Ibid.* 185, 186. See also on p. 194 the detailed discussion of existence of this greater variability within the male sex.

[5] "The fighting instinct is in fact the cause of a very large amount of the world's intellectual endeavor. The financier does not think merely for the money nor the scientist for truth nor the theologian to save souls. Their intellectual efforts are aimed in great measure to outdo the other man, to subdue nature, to conquer assent." *Ibid.* 202, 203.

[6] See John Stuart Mill, *Subjection of Woman* (1869).

from holding any public office of trust seems fully warranted;[7] if, though eligible, none or only a few women do hold office, no harm can possibly result. In a few instances not only have women been made eligible for offices, but for certain offices women alone are made eligible.[8] Where the position is such that a woman will have a deeper insight into and a better understanding of the people with whom she must come into official contact, or where it is expedient that all elements of society be represented, such legislation is beneficial. But as a general rule legislation closing an office to one sex or to one class should be avoided.

The statutes on jury duty present a distinct problem. In the case of men, with recognized exceptions, the service is compulsory. To render it so in the case of women would seem ill advised, regardless of the question of their ability to make good jurors. More women are the sole caretakers of their home than men are the sole managers of their business; therefore to compel the former to serve would probably lead to much serious inconvenience not usually the case when men are forced to serve. Nevertheless, of the eight states making women eligible to jury duty three render that duty compulsory.[9]

The current legislation has not been limited to the subject of public offices. In six states the mother has been made the joint natural guardian, with the father, of their unmarried minor children.[10] A mother is often closer to her minor children than the father, and she should certainly have equal control of their persons. But under our present mode of living, a mother is usually not active

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[7] In the following states women were made eligible for all offices: Ark., Laws 1921, Act 59; Del., Laws 1921, c. 3, § 1; Mass., Laws 1921, c. 449, § 3 (except as excluded by the constitution. Requisitions, however, may be made to the Civil Service Commission for males on the basis of special qualifications.); N. J., Laws 1921, c. 299; Vt., Laws 1921, Act 6; Wis., Laws 1921, c. 529, § 1.

In Nebraska women were made eligible to be elected as trustees of a village. Neb., Laws 1921, c. 129; and in Minnesota they are eligible to appointment as special deputy sheriff to help take charge of a mixed jury. Minn., Laws 1921, c. 369.

In New Hampshire, though women actually hold offices and were elected to the legislature, the people failed to ratify the constitutional amendment making women eligible for office. New York Times, March 15, 1921, p. 10.

[8] Mass., Laws 1921, c. 306, § 1 (the assistant commissioner of labor shall be a woman; *cf.* § 3 which provides that four of the inspectors to be appointed shall be men); N. J., Laws 1921, c. 11 (two of the ten members of the board of health shall be women); Ore., Laws 1921, c. 263 (woman officers to attend, etc. female defendants and witnesses in cases involving a sexual crime); Ore., Laws 1921, c. 273, § 10 providing at the trial of a minor under eighteen, half of the jury shall be women. There may be a practical difficulty in administering this law since no separate panel for women is authorized and since jury service is not compulsory for women. See *infra*, footnote 9.

[9] Me., Laws 1921, c. 180; Minn., Laws 1921, c. 365; N. J., Laws 1921, c. 28.

In the following states the service is optional: Ark., Laws 1921, Act 402 §§ 1, 3; N. Dak., Laws 1921, c. 81; Ore., Laws 1921, c. 273 §§ 5, 6; Wis., Laws 1921, c. 529, § 1; S. C., Laws 1921, Act 184 (women are exempted, which will probably be interpreted to mean that they may serve if they so desire).

In the following states by legislative enactment women are expressly made ineligible: Neb., Laws 1921, c. 113; R. I., Laws 1921, c. 2037; N. H., Laws 1921, c. 144 (though the phraseology may cause some doubt. The statute reads: "the burden of jury duty shall not be imposed upon women, and their names shall not be put in the lists by town officers").

In 1921 in New York a bill (Senate Bill 1859) to render women eligible for jury service was defeated. Such a statute is necessary in view of the absolute prohibition of the present law against women jurors. N. Y., Cons. Laws (1909) c. 30, §§ 502, 598, 686. Nevertheless Justice William Morris of the Municipal Court of the First District is said to have tried a case with a mixed jury. N. Y. Times, March 17, 1921, p. 17.

[10] Ark., Laws 1921, Act 257, § 1; Ind. Laws 1921, c. 97; Mich., Laws 1921, Act 142; S. Dak., Laws 1921, c. 325; Utah, Laws 1921, Act 84; Wis., Laws 1921, c. 529.

in business, and, therefore, if only from insufficient training, is usually not as efficient in business affairs as the father. Therefore, some arrangement should be made whereby the mother's reasonable claim should be given effect to, but, at the same time, the financial interests of the child not subjected to potential danger. In Arkansas the mother is also made jointly and severally liable with the father for the support of their unmarried minor children.[11] It seems unjust to impose upon the mother a financial liability which usually she has much less opportunity and capacity to meet than the father.

A *feme sole* at common law has a legal capacity to transact business and hold property not enjoyed by a *feme covert*. The basis for this distinction is historical rather than reasonable. Three states have recognized that a woman's intellectual equipment is not altered by her matrimonial status.[12] Of course, in many cases a wife might more wisely entrust the management of her own affairs to her husband.

But in some instances the legislation is depriving women of certain legal advantages hitherto enjoyed exclusively by them. Because of the present-day independent attitude of women, it no longer serves a useful purpose to hold a husband liable for the voluntary and wilful torts of his wife.[13] In one state, likewise, when husband and wife are living apart each is free to the same extent from restraint by the other; formerly only the wife was so.[14] One state, applying the principle of equalization, has fixed the same age of majority for men and women;[15] and another state has enacted that both sexes have testamentary capacity at twenty-one.[16] Another state has even placed the rights of dower and curtesy upon an equal footing by making indefeasible the formerly defeasible statutory right of curtesy.[17] The economic dependence of married women on the whole renders indispensable the security of the right of dower. But this reason is inapplicable to curtesy, and such a statute, therefore, seems utterly without basis.

Much of the above legislation cannot but help to alleviate an unfortunate situation. It is submitted, however, that the various legislatures have used no truly scientific working basis; but have legislated impulsively and at random. In the enactment of such statutes consideration has been given to the general intellectual equality of the sexes. But it is even more important that lawmakers likewise study the specific need for the particular measures proposed, and the probable result thereof upon the particular class of the sex affected in the light of the actual and probable activities of that class.[18]

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[11] Ark., Laws 1921, Act 257, § 4.

[12] Idaho, Laws 1921, c. 174, §§ 1, 2 (woman as executrix and administratrix); W. Va., Laws 1921, c. 72 (woman as personal representative); Wis., Laws 1921, c. 529, § 1 (woman as contractor and owner of property).

[13] N. C., Laws 1921, c. 102 (husband no longer liable). *Cf.* Tex., Laws 1921, c. 130 which relieves *both* husband and wife of liability for the torts of the other.

[14] Mass., Laws 1921, c. 56 (where a husband has deserted his wife or with cause she lives apart, or where a wife has deserted her husband or with cause he lives apart, the probate court may prohibit the husband or *wife* from imposing any restraint on the personal liability of the other, amending Mass. Laws 1920, c. 209, § 32 which gave such right not to be restrained to the wife alone.)

[15] Neb., Laws 1921, c. 247 (an unmarried female reaches her majority at the age of twenty-one, raising the age from eighteen). There may be room for argument as to the scientific basis for this parity.

[16] Mo., Laws 1921, p. 117 (an unmarried female must be twenty-one years of age or upward to be able legally to execute a will, raising the age from eighteen).

[17] W. Va., Laws 1921, c. 73.

[18] *Cf.* Wis., Laws 1921, c. 529, § 1, which appears to equalize completely the legal status of the sexes, except where "such . . . will deny to females the special protection and privileges which they now enjoy for the general welfare. . . . " This last clause may well give rise to much litigation.